

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 286 OF 2005

1. Liyakat Shaukat Shaikh
2. Deepak Dattatraya Patil

Presently detained in Kolhapur
Kalamba Central Jail. ..Appellants

V/s
The State of Maharashtra ..Respondent.

Mr. Najmi Murtuza, Advocate appointed for the
appellants, who are in jail.

Mr. Y.S. Shinde, APP for the State.

CORAM : J.H. BHATIA, J.

DATE : 17TH APRIL, 2007.

ORAL JUDGMENT

. This is an appeal filed by the accused persons, who were convicted in Sessions Case No. 62/2003 for the offences punishable under Section 392 r/w section 34, Section 398 r/w section 34, and Section 394 of Indian Penal Code. Both the accused were sentenced to undergo R.I. for 7 years and to pay fine of Rs. 2000/- in default to pay fine to undergo further R.I. for two months on each count. They were also convicted for the offence punishable under 379 r/w section 34 of I.P.C. and were sentenced to undergo R.I. for three years and to pay fine of Rs. 2000/- and in default to pay fine to

undergo further R.I. for two months. The substantive sentence of imprisonment on all the counts was to run concurrently. The accused have challenged the conviction and sentence by this appeal, preferred through jail. At the outset Mr. Shinde, learned A.P.P. makes a statement that accused Deepak Dattatraya Patil has expired pending this appeal.

2. Heard Mr. Najmi Murtaza, learned Counsel for the accused-appellant and Mr. Shinde, learned A.P.P. Perused the record and proceeding of the trial Court.

3. The prosecution case, in brief, is that the incident of this case occurred on 14/9/2001 between 16.15 to 16.45 hours, within the distance at about one or two Km. at three different places. Accused Nos. 1 and 2 were armed with deadly weapons like revolver and chopper and were on a motorcycle. First of all near village Kasarde they came across P.W.1 Rukmini Vithal Sawant and they asked her whether the road would lead further and when she was replying, the accused persons snatched gold Mangalsutra from her neck and at that time accused No.1 Liyakat threatened her with a revolver. Within a few minutes thereafter, at a short distance

they snatched a gold chain from the neck of one Suchita Girkar. As her sister raised shouts, the gold chain fell down on the spot and accused persons ran away. At a short distance from there, the accused persons found one Deepali Bhaskar Rane and attempted to snatch her purse but she ran towards her house. Accused No.2 Deepak followed her and snatched her purse and rushed towards the motorcycle by which the accused persons had come. However, hearing shouts of Deepali, her mother and other relatives came there. The accused No.2 Deepak also put a chopper on the neck of Deepali, while accused No.1 Liyakat fired a shot in the air to threaten them. In that incident Sujata Mother of Deepali sustained injury on the head with a butt of revolver or pistol. However in the scuffle, Deepali succeeded in retrieving her purse and the accused persons ran away. Within a short time after the incident, P.W.1 Rukmini, accompanied by her sister, went to the Police out post Kasarde and narrated the incident. Thereafter P.W.2 Deepali, her mother P.W.3 Sujata and P.4 Suchita and others also came there and narrated the incident. As all the three incident of robbery had taken place within a span of 30 to 40 minutes and within the radius of one or two kilometres, a common case was registered. Sujata

was referred to Medical Officer and two injuries were found on her person. The statements of several persons were recorded. Spot panchanama was prepared.

4. On 8/12/2001 police from Rajarampuri Police Station were on patrolling duty to keep a check on theft of vehicles. At that time, they came across a Maruti Van in possession of accused Nos.1 and 2. As they did not have any driving licence and as a country made pistol with one live round were recovered from them, both the accused persons were arrested by Rajarampuri Police Station. After the arrest on the basis of information given by accused No.2 Deepak, a gold Mangalsutra was recovered and seized at Peth Vadgaon from P.W.10 Champalal and as per the information given by accused No.2, the said Mangalsutra was the property stolen on the day of the incident. It was revealed that the said gold Mangalsutra was pawned with P.W.10 Champalal Mali. After that the information was given to Kankavali Police Station with whom the present case was registered and both the accused were transferred to Kankavali Police Station. During the test identification parade, both the accused were identified as the culprits of the present case. It was also

confirmed that the Mangalsutra seized from P.W. 10 Champalal Mali at the behest of accused No.2 Deepak, was the same, which was stolen away from Rukmini P.W.1. After investigation charge-sheet was filed and case was committed to the Court of Sessions.

5. Charge was framed against both the accused vide Exh.4 for the offence punishable under Section 393 r/w section 34 pertaining to robbery of Mangalsutra of Rukmini. They were also charged for the offence punishable under Section 398 r/w section 34 of IPC for attempt to commit robbery of gold chain of Suchita. They were also charged under section 398 r/w section 34 for committing robbery of a purse of Deepali. They were also charged under section 394 r/w section 34 for causing injury to Sujata Bhaskar Rane, while committing robbery of the purse of Deepali. Besides these charges, accused No.2 Deepak was also charged under section 398 IPC on the ground that he was armed with a knife, while attempting to commit robbery and committing robbery. Accused No.1 Liyakat was also charged under section 3 r/w section 25 of Arms Act for having a firearm i.e. revolver without a valid licence. Both the accused were further charged under section 3 r/w section 25 of the

Arms Act and r/w section 34 of Indian Penal code on the ground that one of them i.e. accused NO.1 Liyakat was armed with a revolver. The accused persons pleaded not guilty and they were put to trial.

6. On behalf of the prosecution in all 14 witnesses were examined and after hearing the parties, the learned trial court acquitted accused persons of the charges under the Arms Act but convicted and sentenced them as stated earlier.

7. With the help of the learned Counsel for the parties, I have minutely gone through the evidence led by the prosecution and the impugned judgment. As noted above in this whole episode, three separate incidents took place within a short span of about 30 to 40 minutes and within the distance of about 1 or 2 Km. P.W. 1 Rukmini is the witness and victim of the first incident. P.W.2 Deepali is the witness and victim of second incident. P.W.3 Sujata is her mother. P.W.5 Nitin is her brother, P.W. 4 Suchita is witness and victim of third incident.

8. P.W. 1 Rukmini deposed that on the day of

incident, at about 6 to 6.15 P.M. she was returning to her mother's house after cleaning her newly constructed house. When she was at a call's distance from her new house, where her husband and son were present, two persons came on a motorcycle from her behind and went ahead, then came back and stopped near her. One of them alighted from the motorcycle, while the other was on the motorcycle. The person, who had come near her, asked her whether there was a road ahead and while she replied in affirmative, that person snatched the Mangalsutra from her neck. She shouted. The person, who was on motorcycle was seen with a pistol in his hand. Due to fear, she allowed the culprit to take away her Mangalsutra. She identified accused No.1 Liyakat as the person, who was sitting on motorcycle and was armed with the pistol, and she identified accused No.2 Deepak, as a person, who had actually snatched her Mangalsutra.

9. P.W. 2 Deepali deposed that on 14/9/2001, she was returning from Malwan to Ozaram. For this, she had come to Kasarde Bus stand and from there she was proceeding towards her house, which was about 2 Km. When she took a turn towards a wadi, she saw two persons who had come from behind on a scooter. They went ahead

of her and then they came back. After coming near her, the scooter was stopped. One person, who was a pillion rider and was holding a revolver alighted from the scooter. He came near her and pointed out the revolver towards her and asked her to stop and not to shout. She tried to run away. That person also followed her. She stumbled on the way and fell down. At that time that person put hand on her mouth and snatched her handbag. Due to her shouts, her parents and cousin also came there. But the said person pointed out revolver towards them, while the other person put the chopper on the neck of Deepali and took away the scooter. The person armed with the revolver fired a shot but Nitin P.W.5 saved himself. That person also gave a blow of butt of the revolver on the head of her mother P.W.3 sujata and caused injury to her. Some scuffle took place and Deepali succeeded in retrieving her handbag. P.W.3 Sujata and P.W. 5 Nitin supported her evidence. It is material to note that as per the evidence of these witnesses, accused No.2 Deepak was the person, who was armed with the pistol or revolver and he had caused injury to Sujata with the butt of the pistol and had also fired to cause fear in the mind of those persons. As per the evidence of these persons, accused No.1

Liyakat was armed with chopper. P.W.6 Dr. Vandana Patil was a Medical Officer, who examined P.W.3 Sujata. She found injury on her person. They were contused lacerated wounds on the left and right side of the temporal region. According to the medical officer, both the injuries could be caused by hard and blunt object.

10. P.W.4 Suchita deposed that on 14/9/2001, she, along with her sister Bharti and her son Vinay, had been to a Doctor. When they were returning home, two persons came on a Yamaha motorcycle and went ahead of them and came back two or three times. Suchita and her sister become suspicious of them and therefore they adopted a short cut route to their house. When they were just near the house, one of those persons came near them and asked whether the said road would lead to Phanasgaon. These ladies replied in affirmative and at the same time, the said person snatched a gold chain from the neck of Suchita. However, she and her sister both shouted as "Chor, Chor". In the said incident the chain was broken and it fell own. Due to the fear those persons ran away. According to her, accused No.1 Liyakat had snatched the gold chain from her neck. As per her evidence, as the chain had fallen down it

remained with her and was not taken away by the culprits. It is material to note that P.W. 4 Suchita does not speak anything about possession or use of any weapon by the culprits.

11. There is sufficient evidence on record to show that P.W.1 Rukmini, P.W. 2 Deepali and P.W. 4 Suchita had identified both the accused persons even during the identification parade. Number of witnesses were examined to prove that fact and I find that the evidence is trust worthy. All the five witnesses also identified the culprits even before the Court during the trial.. Therefore, their remains no dispute about the identify of accused persons. P.W. 9 Pramod Kalyankar was a panch witness to prove the panchanama Exh.39 about the spot incident of all three incidents. The evidence of P.W. 11 API Faruk Kazi, P.W.8 Vijay Bhosale and P.W.10 Champalal Mali is the material about the recovery of Mangalsutra of Rukmini. P.W.11 API Faruk Kazi, deposed that he was investigating a case (Crime No.31/2001) of Rajarampuri Police Station and accused NO.2 Deepak was in his custody in that case. In presence of two panch witnesses, accused No.2 Deepak informed that he had sold two Mangalsutras, one at Jadhavwadi and another to the

owner of Laxmi Jewellers at Peth-Vadgaon. Accordingly the information was recorded as per memorandum Exh.36. Thereafter the police, panchas and accused No.2 Deepak firstly went to Jadhavwadi and seized certain property from Samarth Jewellers owned by Ashok Mali. Thereafter they went to Laxmi Jewellers at Peth-Vadgaon. P.W. 10 Champalal Mali was the owner of that shop. Accused No.2 Deepak informed that he had sold Ganthan to said Champalal. P.W. 10 Champalal admitted that accused No.2 Deepak had pawned the Ganthan or Mangalsutra for amount of Rs. 8,500/- with him. He produced that Mangalsutra, which was seized under the panchanama Exh.37. P.W. 8 Vijay Bhosale, as well as Champalal Mali supported this in their evidence. That Mangalsutra was identified by P.W.1 Rukmani as her property. As stated earlier the accused persons could not succeed in taking away handbag of P.W. 2 Deepali and gold chain of P.W.4 Suchita and therefore, there was no question of any recovery of their property.

12. It is material to note that the weapons which were allegedly used in this offence, were not produced before the Court. The learned trial court noted in para 39 of the Judgment that one revolver was allegedly

recovered from the accused but that was not produced before the Court, nor ballistic expert's report was produced. The learned trial Court noted "we do not know if it was a toy gun". He observed, "we cannot say that it is proved that accused possessed firearm or ammunition without licence". With these observations both the accused came to be acquitted of all the charges under the Arms Act. In view of this, Mr. Murtaza, learned Advocate for the appellant vehemently, contended that the prosecution has also failed to prove that the accused persons were armed with deadly weapons. Not only from these observations of the trial court he found some support but he also found support to this contention from the other evidence led by the prosecution.

13. It is material to note that in the charges framed by the trial Court, it was specifically alleged that the accused No.1 Liyakat was armed with revolver and because of this, he was charged not only under the Arms Act but also under section 398 pertaining to three incidents. As per the charge, accused No.2 Deepak was armed with a knife at the time of incident. Therefore he was also charged under section 398 IPC. While

Rukmini deposed that the man, who was sitting on the motorcycle, was holding a pistol and she identified accused No.1 Liyakat as that person, the other witness particularly P.W.2 Depali, P.W.3 Sujata and P.W.5 Nitin, however, deposed that accused No.1 Liyakat was holding a chopper and accused No.2 Deepak was armed with a pistol. It is material to note that as per the charge none of these two persons was armed with any chopper. There were allegations that accused No.2 Deepak was holding a knife. Knife and chopper are certainly different weapons and cannot be mistaken for each other. In view of the evidence P.W.2 Deepali, her mother P.W.3 Sujata and cousin P.W.5 Nitin, it is proved that accused No.1 Liyakat was not armed with pistol. As there was no charge that any of the accused was holding a chopper, it also cannot be held that the accused No.2 Deepak was armed with a chopper. Taking into consideration the evidence of these witnesses, it is also difficult to place implicit reliance on the testimony of P.W.1 Rukimini that accused No.1 was armed with pistol or revolver. In view of the fact that in spite of the stand taken by the prosecution that revolver or pistol was seized from the accused No.1, it was not produced before the court, nor ballistic report was produced to

prove that what was seized from him was really a firearm. Taking into consideration these circumstances and the evidence, it may be held that though the prosecution has proved the robbery and attempt to robbery and also causing of injuries to Sujata by one of the accused, prosecution has failed to prove that any of the accused persons was armed or had used any deadly weapons. Therefore, conviction under section 398 IPC cannot be sustained. Taking into consideration the circumstances and the evidence on record in respect of robbery of Mangalsutra P.W. 1 Rukimini, both the accused persons can be convicted for the offence punishable under section 392 r/w section under section 34 of IPC. In respect of the incident of Deepali, it cannot held that the offence of robbery was actually committed. The attempt was made to snatch and take away her hand bag but in the scuffle the handbag was left on the spot and Deepali retrieved it. It was a case of an attempt to commit robbery. But the evidence on record reveal that in that attempt accused No.2 Deepak had caused injuries to P.W. 3 Sujata, mother of Deepali therefore, for that incident both the accused persons could be convicted for the offence punishable under Section 394 IPC. In respect of the incident pertaining

to PW. 4 Suchita, neither there is any allegation of any force being used nor there is any allegation that she was put under threat or fear of life or injury nor there is any evidence that any weapon was used or shown to her. Her chain could not be taken away by the culprits. Therefore, it was the case of attempt of chain snatching, which amounts the offence of attempt to commit theft. Therefore, both the accused persons could be convicted for the offence punishable under section 379 r/w section 511 and section 34 of IPC.

14. As pointed out earlier, both the accused were convicted for the offences punishable under section 392, 394, 398 r/w section 34 as well as section 379 r/w section 34 of Indian Penal Code. In view of the observations made above, conviction under section 398 IPC cannot stand but the conviction under section 392, and 394 Indian Penal code needs no interference. Conviction under section 379 IPC cannot stand but accused are liable to be convicted under section 379 r/w section 511 and Section 34 of IPC. Next question is about the punishments. The offence under section 392 IPC is punishable with R.I. for a term which may extend to 10 years with fine. The offence punishable under

section 394 IPC is punishable with imprisonment for life or R.I. for a term which may extend to 10 years with fine. No minimum sentence of imprisonment is prescribed for any of these two offences. For the offence punishable under section 397 and 398 IPC the minimum sentence is imprisonment for 7 years. It appears that the learned trial Court had convicted the accused persons under section 398 IPC and awarded R.I. for seven years for each of the three counts. Accused No.1 Liyakat was arrested on 22nd January, 2002 and accused No.2 Deepak was arrested on 2nd February, 2002. Accused No.1 Liyakat is in jail since then. Thus he is practically in jail for five years and three months. In my opinion taking into consideration the circumstances, it is not necessary to award R.I. for seven years. The sentence already undergone is sufficient to meet the ends of justice.

15. Therefore the appeal is partly allowed.

(i) The conviction and sentence for the offence punishable under section 398 r/w section 34 of Indian Penal Code is hereby set aside.

(ii) The appellants/accused are convicted for the offence punishable under section 392 r/w section 34 of Indian Penal and are sentenced to undergo R.I. for four years and to pay fine of Rs.500/- and in default to pay fine to undergo R.I. for one month.

(iii) They are also convicted for the offence punishable under section 394 r/w section 34 of Indian Penal Code and are sentenced to undergo R.I. for five years and to pay fine of Rs. 500/- and in default to undergo R.I. for one month.

(iv) They are also convicted for the offence punishable under section 379 r/w section 511 and section 34 of Indian Penal Code and are sentenced to undergo R.I. for one year.

. The substantive sentences of imprisonment on all the counts shall run concurrently.

(J.H. BHATIA, J.)

